Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-47

FLORENCE DIFFENDERFER and NISHAN PAUL,

Appellants,

—v.—

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a non-profit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Comptroller of the State of Florida,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF OF APPELLANT FLORENCE DIFFENDERFER

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This reply brief, submitted in behalf of the appellant Florence Diffenderfer, addresses itself to the single question: Has the case become moot by reason of the enactment by the State of Florida of Chapter 71-133, 1971 Laws, Second Legislature?

I. The Appeal Has Not Been Rendered Moot

On February 28, 1971, this Court noted probable jurisdiction to the appeal in this case which presented the following question:

A. Do the First and Fourteenth Amendments to the United States Constitution forbid governmental tax exemption to extend to church owned commercial business enterprises?

(1) Does the tax exemption granted by the defendant, Dade County, Florida, to the defendant, Central Baptist Church of Miami, Florida, on real property utilized six days and evenings of each week for commercial profit making purposes violate the First and Fourteenth Amendments to the U. S. Constitution prohibiting the establishment of religion and protecting the free exercise thereof?

On June 15, 1971, the Governor of Florida signed into law Chapter 71-133, the effect of which is to render subject to ad valorem taxation church-owned property to the extent that it is used for other than church purposes. This, it may be presumed, means that after the effective date of the new statute the parking lot owned and operated by the appellee Central Baptist Church of Miami will become subject to pro rata taxation.

The appellant Florence Diffenderfer does not challenge the constitutionality of the new statute. We do not contend that if any part of church-owned property is used for commercial purposes the Constitution forbids exemption to that part which is used for worship or as a necessary adjunct thereto. We concede that a parking lot adjacent to

a church may be within the purview of *Walz* v. *Tax Commission,* 397 U.S. 664 (1970) to the extent that it is used by worshippers while in church.

This, however, does not make the present case moot or require dismissal of the appeal herein. When the Court noted probable jurisdiction, it thereby ruled that a substantial Federal question of national significance and importance was present which called for resolution by the Court. It can hardly be denied that the question whether "the First and Fourteenth Amendments to the United States Constitution forbid governmental tax exemption to extend to church-owned commercial business enterprises" is one of national importance which should be answered definitively and can only be so answered by this Court.

We recognize, of course, that this fact alone may not be sufficient to save the present appeal from dismissal for mootness. It may well be that in some cases mootness may remove an appeal from the "case or controversy" category and thus perhaps affect the Court's jurisdiction under Article III of the Constitution. We submit, however, that the present appeal is not vulnerable to dismissal for mootness for the following reasons:

1. The new statute is not yet operative. Section 17 thereof provides that "This act shall take effect December 31, 1971." (See Suggestion by the Attorney General, p. 15.) At the very least, therefore, a determination of the appeal herein adverse to the appellee Central Baptist Church would render it liable for the taxes for the current year. This alone is sufficient to remove any taint of possible mootness from the case. *Powell* v. *McCormack,* 395 U.S. 486, 495-500 (1969).

2. Under Florida law, the appellee Central Baptist Church is liable for three years' back taxes should the appellants prevail in this suit. Section 193.23 Fla. Stat. F.S.A. provides in part as follows:

> When it shall appear that any ad valorem tax might have been lawfully assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied, and has not been collected for any year within a period of three years next preceding the year in which it is ascertained that such tax has not been assessed, or levied, or collected, then the officers authorized shall make the assessment of taxes upon such property in addition to the assessment for such property for the current year * * * .

Appellant Central Baptist Church does not cite this section in its brief, but cites instead two Florida decisions, *Coppock* v. *Blount,* 145 So.2d 279 (Fla. App. 3d 1962) and *City of Naples* v. *Conboy,* 182 So.2d 412 (Fla. 1965). Neither of these decisions, however, effects a judicial repeal of Section 193.23. These cases hold only that *where special circumstances exist* the State may be estopped on equitable principles from seeking to recover back taxes under an exemption law declared to be inapplicable or unconstitutional. Thus, in *Coppock* v. *Blount,* the court noted:

> Plaintiffs further allege that the defendants knew back in 1957 that the school was being operated through a corporation on the real property of the plaintiffs, Lorin F. Coppock, Jr., and Lucille W. Coppock, his wife, and yet continued to grant the plaintiffs the exemption afforded educational institutions; that had the defendants informed the plaintiffs of their intention not

> to grant the exemption because the operation of the school had been separated from the ownership of the real estate on which it was situated, *plaintiffs could have obviated the problem by either dissolving the corporation or by conveying the real estate to the corporation.* (145 So.2d at 280. Emphasis added.)

Similarly, in *City of Naples* v. *Conboy,* the Florida court noted (at 182 So.2d 418) that

> * * * The city has affirmatively acted in assessing taxes as agreed under the contracts with the various developers over a period of years and it is reasonable to believe that the developers have long acted in reliance thereupon. * * *

In the present case there are no special circumstances upon which equitable estoppel can be based, and nothing in either Florida decision can be interpreted as meaning that notwithstanding the express language of Section 193.23 back taxes cannot be collected after an exemption statute is declared unconstitutional.

Since the appellee Central Baptist Church remains liable for at least three years back taxes, the appeal herein is not moot. *Powell* v. *McCormack, supra; Bond* v. *Floyd,* 385 U.S. 116, 128 (1966).

3. Even if the State of Florida is estopped from or chooses not to enforce a claim for back taxes, the appellants are not barred from asserting nor this Court from declaring the appellee Church's liability therefor. Under *Flast* v. *Cohen,* 392 U.S. 83 (1968), the appellants herein had standing to bring this suit because as taxpayers they were injured by the exemption accorded in violation of the Estab-

lishment Clause. This was an injury separate from and independent of that suffered by the State of Florida by reason of its non-collection of moneys due it. It is, we submit, within the competence of this Court under the Supremacy Clause of the Constitution (Article VI) to grant at least declaratory relief for the violation of the plaintiffs' constitutional rights notwithstanding the waiver or estoppel on the part of the State.

CONCLUSION

For the reasons stated, the appeal herein is not moot and should be decided on the merits.

Respectfully submitted,

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